(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

CRIMINAL APPEAL NO. 327 /2004

APPELLANTS (IN JAIL) :

1] Jagan Nagesia
S/o Beegu Nagesia,
Aged about 33 years,
Occupation-Cultivator,
R/o Village Piyar Toli Para,
Baksapur, P.S. Kusami,
Distt. Surguja (C.G.)

1256/04

Filed on 22/3/05
by Shri Manoj Parsekar for
advocate

2] Mandeep @ Prashant @ Prabhat Thakur, S/o Prasiddha Thakur (Nai) Aged about 21 years,
Occupation - Cultivator,
R/o. Village Bandu Chataru,
P.S.Ranka,Distt.Gadawa (Jharkhand)

22/3/05

3] Mandev S/o Ladaiya Bhuihar
Aged about 31 years
Occupation Cultivator,
R/o. Village Bhalu Pani,
P.S.Shankargarh,Distt.Surugja (C.G.)

4] Indrajeet Nagesia
S/o Dewar Nagesia,
Aged about 36 years,
Occupation-Cultivator,
R/o. Village Charhatkhurd,
P.S. Kusami, Distt. Surguja (C.G.)

CERTIFIED COPY
22/3/05
Clerk to A G. Bilaspur

VERSUS

RESPONDENT : State of Chhattisgarh
Through: P.S. Kusami,
Distt. Surguja (C.G.)

APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE

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(32)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.A. No. 327/2004

APPELLANTS : **Jagan Nagesia and others**

VERSUS

RESPONDENT : **State of Chhattisgarh.**

Shri Manoj Paranjape counsel for the appellants.
Shri D.K. Gwalre Panel lawyer for the respondent/State.

JUDGMENT

(Delivered on 06-10-2005)

Dhirendra Mishra, J

The appellants have preferred this appeal against the impugned judgment dated 22.1.2004 passed by First Additional Session Judge, Ambikapur, District Sarguja, in Sessions Trial No. 45/2003 whereby they have been convicted under sections 307, 147, 148, 152, 186 and 353 of the Indian Penal Code and sentenced to undergo R.I. for 5 years with fine of Rs. 500/-, 2 years with fine of Rs. 100/-, 1 year with fine of Rs. 100/-, 3 months with fine of Rs. 500/-, 3 months, and 2 years with fine of Rs. 500/- respectively.

2. Case of the prosecution is that PW-8 Suresh Chandra Minz, the Head Constable of Police Station Kusmi lodged a Dehati Nalisi against the unknown persons on 10.8.2001 at about 6.30 p.m. to the effect that the Station House Officer of Police Station Kusmi received a secrete information that absconding accused namely Dashrath Nagesia is hiding in his house at village Dhavai Toli (Tati Jharia) and acting upon that information the Police Party consisting of Haricharan Singh, SHO (PW-17), Suresh Chandra Minz, Head Constable (PW-8), Harindra Nath, Head Constable (PW-18), Pushpendra Rao, Constable, Ramsai Toppo, Constable and Rakesh Kumar, Driver (PW-6) which was headed by R.K.

Kurre, SDO (P), proceeded to arrest him at 17.00 hours on 9.8.2001 and they came to know that in the house of Sukhna Nagesia and Baleshwar Nagesia food for 20-23 Naxalites was prepared and after having the food the said Naxalites had gone towards village Laxmanpur. While Ramchandra Nagesia was being interrogated by the Police regarding the whereabouts of Naxalites, Driver Rakesh Kumar Singh reached there and told the Police officials that Naxalites were approaching them. Thereupon, the Police party took position and warned the Naxalites to surrender. However, instead of surrender the Naxalites started firing at the Police which continued throughout the night. However, in the morning at 5.20 a.m. on 10.8.2001 when Naxalites stopped firing, the Police Party took off their position thinking that the Naxalites had fled away, firing from the side of Naxalites was again started and in the said firing one bullet hit the left side of chest of SHO Haricharan Singh and came out piercing his back. Thereafter, all the Naxalites who were 20-23 in number including three Naxalite ladies wearing Khaki dress, fled away from the scene. Subsequently, on the basis of Dehati Nalisi (Ex P-8) First Information Report (Ex P-9) was registered. During investigation spot map (Ex P-1 and P-2) was prepared by the Patwari namely Rengu Singh (PW-2). Thereafter, injured Station House Officer was sent for medical examination and the medical examination report is Ex P-7. The seized articles were sent to the Forensic Science Laboratory, Raipur for examination and the FSL Report is Ex P-5. After the investigation was over, the District Magistrate accorded permission for prosecution of the accused persons vide Ex. P-16. However, the appellants pleaded their false implication in the case, they were put to trial.

3. During trial the prosecution examined as many as 18 witnesses namely Ramsai Toppo, Constable (PW-1), Rengu Singh, Patwari (PW-2), H.P.Singh, Inspector (PW-3), Begun Ram (PW-4), Dr. T. Sai (PW-5), Rakesh Singh Sengar, Driver (PW-6), Ravi Kumar Kurre, SDO (P) (PW-7), Suresh Chandra Minz, Head Constable (PW-8), Inder (PW-9), Hardev (PW-10), Manpod (PW-11), Ramchandra (PW-12), Jathuram (PW-13), J.B. Panda (PW-14), R.N. Yadav, Inspector (PW-15), Barnabas Ekka, Head Constable (PW-16), Haricharan Singh, Inspector (PW-17) and Harindra Nath, Head Constable (PW-18). The trial Cou[illegible]elying upon the

statements of witnesses namely PW -3, PW-5, PW-6, PW-7, PW-17 and PW-18, convicted and sentenced the accused persons as mentioned above.

4. Learned counsel for the appellants has assailed the impugned judgment of the trial Court on the following grounds:

(A) that the FIR has been lodged by R.K.Kurre (PW-7) as per the information given by injured witness namely Haricharan Singh (PW-17) which is against the unknown persons;

(B) no Test Identification Parade was conducted during investigation and the accused persons are not known to the witnesses and solely on the basis of their identification in the Court for the first time during trial, the appellants have been convicted for the offences mentioned above;

(C) that all the witnesses are Police personnel and none of them has stated either in the diary statement or in the Dehati Nalisi that they recognized the accused persons and since they have improved their statements before the Court, they are not reliable but even then the learned trial Court relying on their statements has convicted and sentenced the accused persons as above;

(D) that nothing has been seized from the appellants which may connect them with the aforesaid offence. Though it is alleged that the firing continued throughout the night, no empties have been recovered from the spot;

(E) that though it is alleged that 20-23 Naxalites were involved in the incident, none of them has stated that the appellants were carrying gun or firing with the guns and only on the basis of general allegations the appellants have been convicted for the offences mentioned above.

5. On the other hand learned counsel for the respondent/State supporting the impugned judgment of the trial Court convicting and

sentencing the appellants as above, submits that it is just and proper and no interference with the same is called for in this appeal.

6. I have heard learned counsel for the parties and perused the evidence available on record.

7. The judgment of the trial Court convicting and sentencing the appellants as mentioned above, is solely based on the statement of PW-5, the doctor who treated the injured. The said doctor has opined that injuries No. 1 and 2 caused on the person of the injured were caused by gun. He further opined that these injuries were grievous in nature and were caused 12 hours prior to the examination. Since the injuries have been caused with the help of gun on the vital part of the body of the injured, the intention of committing murder has been inferred.

8. Learned trial Court has further relied upon the statement of injured witness (PW-17), who has stated that he accompanied the Police Party on the date of incident and he identified the accused persons by face though he did not know them by name. He has further stated that when the Police party was on the way, the accused persons came from behind and started firing with an intention to kill them and the firing continued throughout the night and it stopped at about 5.20 a.m. However, after a brief stoppage the Naxalites again fired and one bullet hit on the left portion of the chest of the injured and came out piercing his back. This witness has however admitted in paragraph 9 of his cross examination that at the time of lodging Dehati Nalisi by Suresh Chandra Minz, he was unconscious and therefore, the fact that he recognized the accused persons by face and saw them running away could not be disclosed to said Suresh Chandra Minz. He also admitted the fact that he had first seen the accused persons at the place where the incident took place and thereafter he saw them in the Court.

9. Learned trial Court has also relied upon the statement of R.K. Kurre (PW-7) who has stated in his evidence that he recognized the appellants namely Mandeep and Jagan and did not recognize others. He has further stated that when they were proceeding to nab the absconding accused

persons, the firing was started by the Naxalites at the Police party in Laxmanpur village as a result of which Sub Inspector Haricharan Singh sustained bullet injuries over his chest. He however admitted that he did not mention this fact while lodging Dehati Nalisi as his attention at that time was towards the injured Sub Inspector Haricharan Singh and the diary statement was not recorded during investigation..

10. Rakesh Singh Sengar (PW-6), the driver of the jeep which the Police Party had boarded, has stated in his statement that he recognized the appellants namely Mandeep and Jagan but did not recognize the others. He has also stated that when the Police party reached Laxmanpur, the accused persons who were 15-20 in number opened firing at them and thereafter the Police took the position and firing started from both the sides and in this firing which continued throughout the night, SHO Haricharan Singh (PW-17) sustained injuries. However, in the cross examination he has stated that whatever statement he had given is at the behest of SDO (Police) as he was his subordinate.

11. Harindra Nath (PW-18), the head constable has stated in his statement that he recognized all the accused persons. He has further stated that on the fateful day he had accompanied the Police party and they left their jeep in village Tati Jharia and proceed on foot. When they reached village Laxmanpur 20-22 Naxalites including two female members carrying rifles and guns started firing at the Police party and in retaliation the Police party also fired at them and in the said firing the SHO (PW-17) sustained bullet injuries on his chest. He has further stated that as the Naxalites had come very close to them, he saw their faces. He has also stated that the accused persons who were present in the Court had in fact, fired at them. However, in paragraph 7 of his deposition he stated that while making diary statement before the Police he told them that he recognized the accused persons when he turned around and saw them.

12. The only question to be decided in this appeal is whether the accused persons being stranger are not known to the eyewitnesses and the prosecution did not conduct the test identification parade during investigation and whether the identification by the witnesses for the first

time in the Court during the trial can be relied upon by the trial Court for convicting and sentencing the accused persons.

13. It is not disputed that failure to hold test identification parade would not make inadmissible the evidence of identification in Court as the evidence of identification in Court is the substantive piece of evidence and the test identification parade provides corroboration to the sworn testimony of the witnesses in court as to the identity of the accused. In appropriate cases, the Court may accept the evidence of identification in Court even without insisting on such or other corroboration as is held by the Apex Court in its various judgments.

14. In the present case, I am of the opinion that it is not safe to rely upon the statements of the witnesses wherein they claim to have identified the accused persons for the first time in the Court and that too when this identification is not corroborated by the test identification parade, for the following reasons:

(I) that all the witnesses who have recognized the appellants are the Police officers and all the independent witnesses who are examined as PW-9, PW-10, PW-11, PW-12 and PW-13 have not supported the case of the prosecution;

(II) that the appellants were stranger to the witnesses and the incident took place in the night as already discussed in the preceding paragraphs, none of the witnesses whose statements have been relied upon by the trial Court have disclosed this fact that they recognised the accused persons who were involved in the incident and they could identify them. This apart, no description has been given by any of the witnesses either in the Rojnamacha Sana or in the diary statements. Thus taking into consideration the fact that even according to the prosecution 20-23 persons were involved in the incident, identification for the first time in the Court during trial by the witnesses who are none else but the police officials, is not credible.

15. Learned counsel for the respondent/State relied upon the judgment of the Apex Court in the matter of **Malkhansingh and others Vs. State of M.P.** reported in **(2003) 5 SCC 746** and argued that failure to hold test identification parade would not make inadmissible the evidence of identification in Court as the test identification parade does not constitute substantive evidence and the substantive evidence is the evidence of identification in Court and the Test Identification Parade provides corroboration to the sworn testimony of the witnesses in Court as to the identity of the accused. As already discussed in the foregoing paragraphs, in appropriate cases the accused can be convicted on the basis of evidence of identification in the Court and such identification must depend upon the facts and circumstances of each case and no general rule can be laid in this regard. In paragraph 10 of the above cited judgment it has been held that much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court.

16. In the present case also apart from that, none of the witnesses has stated during investigation that they were in a position to recognize the accused persons as they have not stated any particular reason in their deposition for identifying the appellants before the court.

17. In the present case the appellants were arrested almost one year after the date of incident i.e. on 28.8.2002, 30.8.2002, 19.9.2002 and 30.9.2002 and that almost all the witnesses were Police officials it was all the more necessary for the prosecution to conduct test identification parade to establish identity of the accused persons.

18. In view of the aforesaid analytical discussion I am of the considered view that it is not possible to sustain the conviction and sentence in respect of any of the accused persons. As such the appeal succeeds. Impugned judgment of the trial Court convicting and sentencing the appellants as mentioned above is set aside. Appellants are acquitted of

the charges leveled against them. They are directed to be set at liberty forthwith if not required in any other case.

Sd/-
DHIRENDRA MISHRA
Judge